[2014] JMSC Civ 183

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV06118

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATION LIMITED**	**CLAIMANT/ APPLICANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT/ RESPONDENT**

Ms. Carol Davis instructed by Carol Davis & Co. for the Claimant/Applicant

Ms. Tamara Dickens instructed by the Director of State Proceedings for the Defendant/Respondent

November 3 and 12, 2014

Application for Judgment in the Form of Declaratory Relief – Whether defendant/respondent to be given extension of time to plead the Limitation of Actions Act as a defence – Whether Supreme Court can extend time limited by the Court of Appeal

D. FRASER J

THE APPLICATION AND BACKGROUND

[1] By Notice of Application for Court Orders dated and filed July 10, 2014 the claimant/applicant sought the following orders:

1. That the claimant be given leave to enter judgment against the defendant.
2. That judgment be entered for the claimant and against the defendant in the following terms:
    (i) A declaration that without more, the letter from the Ministry of Education Youth and Culture dated 6th July, 2001 addressed to the claimant did not constitute a referral of the decision of the Adjudicator

to an Arbitrator pursuant to Clause 25.2 of the Conditions of Contract.

(ii) A declaration that without more the letter for the Ministry of Education Youth and Culture dated 20th December 2001 addressed to the claimant did not constitute referring the decision of the Adjudicator to an Arbitrator pursuant to Clause 25.2 of the Conditions of Contract.

(iii) A declaration that pursuant to the Contract between the claimant and the Ministry of Education Youth and Culture and with respect to the construction of a School at Annotto Bay, the decision of the Adjudicator with respect to adjudication 1 dated 15th June, 2001, adjudication 3 dated 27th November 2001, and adjudication 5 dated 27th November, 2001 is final and binding on the parties.

(iv) Further or other relief.

(v) Costs to the claimant to be agreed or taxed.

[2] The application was supported by an affidavit of Roy Williams, the managing director of the claimant/applicant, dated November 23, 2009. The application has arisen in this way. On or about December 16, 1998 the claimant/applicant entered into a contract with the Ministry of Education, Youth and Culture (MOEYC) whereby the claimant/applicant undertook the extension and refurbishment of the Annotto Bay Primary School in consideration of the contract sum of $49,488,878.00. In that contract the procedures for the determination of disputes between the parties were set out at clauses 24 and 25.

[3] Clause 24 provides as follows:

24. **Disputes**

> 24.1 If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.

[4] Clause 25 provides as follows:

> 25. **Procedure for Disputes**
>
> 25.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.
>
> 25.2 The Adjudicator shall be paid by the hour at the rate specified in the Bidding Data and Contract Data, together with reimbursable expenses of the types specified in the Contract Data, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.
>
> 25.3 The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the Contract Data.

[5] The Adjudicator appointed pursuant to the contract was the Hon Dr. Lloyd Barnett OJ. He made five different adjudications, three of which are being relied on by the claimant/applicant for the purposes of these proceedings. The adjudication process began after the Permanent Secretary in the MOEYC in or about June 2001 wrote to the claimant in an undated letter indicating that there had been a breach of the contract due to the failure of the claimant/applicant to proceed diligently with the works and the contract was being terminated.

[6] That issue was referred to the Adjudicator who in Adjudication number 1 dated June 15, 2001 determined *inter alia* that the issue of fundamental breach could be raised by the Project Manager as part of his duties of

administering the contract. The issue of whether or not there had in fact been a fundamental breach was then referred to the Adjudicator by the claimant/applicant. By Adjudication number 3 dated November 27, 2001 the Adjudicator determined that the MOEYC had breached the contract and that the claimant was entitled to damages. By Adjudication number 5 also dated November 27, 2001 the Adjudicator determined *inter alia* that the completion date of the contract should have been extended.

[7] By letters dated July 6 and December 20, 2001 the MOEYC wrote to the claimant/applicant disputing certain aspects of Adjudications 1, 3 and 5. In the July letter the Ministry said that it, "duly serves notice that it will refer these matters to Arbitration as per clause 25 of the Condition of Contract". In the December 20 letter the Ministry said it "duly refers" the said matters to arbitration. Mr Williams in his affidavit stated that the claimant/applicant did not receive the July 6, 2001 letter until on or about April 2002.

THE SUBMISSIONS

[8] Counsel for the claimant/applicant submitted that these letters did not in fact amount to referrals as no attempt was made to have an Arbitrator appointed, to set up arbitration proceedings and to proceed with an arbitration. In any event, counsel submitted that the letters were out of time given the time period allowed in the contract for referrals to arbitration. Counsel for the claimant/applicant noted that no defence was filed suggesting that the letters amounted to referrals. Consequently it was submitted that the matters determined by the Adjudicator should stand.

[9] In fact counsel for the defendant/respondent did not contend that referrals to arbitration had properly been made. Instead the application was resisted solely on the basis that the declarations sought were statute barred. That contention was first made in written submissions filed and served on the afternoon of Friday October 31, 2014 for the hearing scheduled on November 3, 2014.

[10] In addressing the contention of the defendant/respondent counsel for the claimant/applicant first cited the Civil Procedure Rules (CPR) r. 8.6 which provides, *"A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed."*

[11] Counsel pointed out the Fixed Date Claim Form (FDCF) was filed November 23, 2009 and the acknowledgment of service was filed January 19, 2010. However no defence or affidavit outlining a defence has to date been filed. Counsel noted that limitation of action is a defence and must be pleaded. If a party does not wish to rely on it the party doesn't have to, but if the party wishes to rely on it they have to plead it. Under CPR r 27.2 the claimant/applicant was seeking judgment at the first hearing of the claim form.

[12] Concerning the requirement to plead limitation of action as a defence counsel cited **Bullen & Leake & Jacob's Precedents of Pleadings** 13th Edition at page 1291. There reference was made *inter alia* to the English R.S.C. Ord. 18 r (8)1 and to ***Ketteman v Hansel Properties Ltd.*** [1988] 1 All E R 38 HL. In ***Ketteman*** the House of Lords held that where a defendant decided not to plead a procedural bar, such as a limitation defence, before trial and fought the case on its merits it was not open to him to amend his defence during the final stages of the trial in order to plead the procedural defence when it had become apparent that he was likely to lose on the merits. **Bullen & Leake** therefore suggest that ***Ketteman*** established that an application to amend to plead the limitation defence at trial is likely to be refused where the prior failure to plead it was deliberate or negligent.

[13] Counsel next cited **Chitty on Contracts** 26th Edition para 1985 where it is outlined that a party is not bound to rely on limitation as defence if he does not wish to do so and that it should be specifically pleaded. It is noted that *"Even where the effect of the statute is to extinguish the plaintiff's title to*

land or goods, it would seem not to be sufficient simply to deny that title and the statute should be specifically pleaded." The English Limitation Act of 1980 and R.S.C Ord. 18 applied in that regard. Reference was also made in **Chitty** to ***Ronex Properties Ltd. v. John Laing Construction Ltd.*** [1983] Q.B. 398 CA, where it was held that an application for a claim to be struck out on the ground that it disclosed no cause of action could only properly be made where it was manifest that there was no answer immediately destructive of the claim; that, since a defence under the Limitation Acts barred the remedy and not the claim and the defence had to be pleaded, the application to strike out the pleadings was misconceived. In relation to the Limitation Acts at page 404 Donaldson L.J. also noted that, *"Even when pleaded they are subject to various exceptions, such as acknowledgment of a debt or concealed fraud which can be raised by way of reply."* Counsel submitted that were the defendant/respondent allowed to rely on the limitation defence at this stage, with it not even being pleaded, the claimant/applicant would be unfairly deprived of raising an answer such as acknowledgment of debt.

[14] Counsel noted that when the FDCF came before the court May 5, 2010 an unless order was made indicating that if a defence or affidavit in response to the claimant/applicant's FDCF and affidavit were not filed by June 25, 2010 an order would be granted pursuant to paragraph 3 of the FDCF, which set out the reliefs prayed for. No defence or affidavit was filed. The defendant/respondent subsequently appealed that order. By consent on June 3, 2014 the Court of Appeal ordered *inter alia* that the unless order of May 5, 2010 was set aside and the appellant (defendant/respondent) was to file an affidavit in response in the proceedings in the Supreme Court on or before July 31, 2014. It was also ordered that the proceedings in the Supreme Court should be set for speedy trial. To date no defence or affidavit in response has been filed. In those circumstances counsel for the claimant/applicant submitted that the

failure to file any response was intentional and the order sought should be granted as prayed by the claimant/applicant.

[15] As previously noted counsel for the defendant/respondent opposed the application on the basis that the claim was statute barred. Counsel's contention was that it would be pointless to have the court determine whether the letters from the MOEYC amounted to a referral of the decisions of the Adjudicator to Arbitration. As more than six (6) years has elapsed any rights accruing to the claimant/applicant and any attempt to establish those rights pursuant to the Conditions of Contract and the substantive Contract, would have long been extinguished in accordance with the Limitations of Action Act. Counsel relied on the affidavit of Mr. Roy Williams to ground the lapse of time.

[16] Further counsel submitted that the authorities relied on by the claimant/applicant do not address a situation where what is being sought is only declaratory relief. ***Ketteman*** for instance dealt with a claim in negligence. It was noteworthy counsel said that the claimant had not come with a claim in contract. Counsel submitted the strictures requiring pleading the limitation defence for it to be relied on were clear in actions dealing with substantive claims, but did not similarly apply when declaratory relief was sought. Counsel cited the case of ***Norman Washington Manley Bowen v Shahine Robinson and Neville Williams*** [2010] JMCA App 27 where the Court of Appeal, per Morrison J.A., adopted the definition of declaratory judgment expressed by Zamir & Woolf in **Declaratory Judgment** 2nd edn. Para.1.02, thus:

> A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is

> disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position. (Emphasis added by counsel).

[17] Counsel for the defendant/respondent submitted that the court should not enter a declaratory judgment as the court should not act in vain. What the claimant/applicant was seeking to do was to get around the Limitations of Actions Act by going for declaratory relief rather than seeking to enforce the contract. Counsel therefore sought time to file a defence relying on limitation of actions. Counsel indicated her agreement that the limitation of actions bars the remedy and not the right, but submitted that it was unclear how the court would treat with an order that the determination of the Adjudicator is binding and hence wished an opportunity to set out in an affidavit the defence relying on the statute of limitations. Counsel relied on the case of ***Topaz Jewellers and Raju Khemlani v National Commercial Bank Limited*** [2011] JMCA Civ 20 which considered ***Ketteman***. In ***Topaz Jewellers*** the Court of Appeal upheld the trial judge's granting of an application to plead the Limitation Act 1623 and the Limitation of Actions Act 1881 at the point at which the trial was about to commence. Counsel relied on this case to suggest that the court should grant time for the limitation of actions defence to be pleaded.

[18] In reply Ms. Davis indicated that the ***Topaz Jewellers*** case could be distinguished as in that case the trial had not started while in the instant case the application was being made during the hearing of the trial, in a context where the defendant/respondent had not complied with two orders to file an affidavit in response. Further counsel pointed out that the second

order contained a time limited by the Court of Appeal and this court would not have jurisdiction to extend that time. Counsel also submitted that it was by no means clear that the Limitation of Actions defence would succeed as the relevant date would not be the date of the contract but the date of the breach in a context where there were ongoing negotiations between the parties even beyond the date of the Adjudications. The declarations would not be in vain she maintained as they would permit the process to be continued with the submission of the relevant documentation for consideration and if needs be enforcement could subsequently be pursued if the Limitations of Actions Act did not apply.

ANALYSIS

[19] It is common ground that the Limitation of Actions Act bars the remedy and not the right. Had the defence been pleaded the claimant/applicant would have had the option to plead acknowledgment of debt. ***Ronex Properties Ltd.*** The CPR r 8.6 also specifically allows the court to grant relief in circumstances where a remedy may not be obtainable. I agree with counsel for the claimant/applicant that the ***Topaz Jewellers*** case can be distinguished in the manner she suggested. Further unlike the ***Topaz Jewellers*** and ***Ketteman*** cases, not granting the time to plead the defence now, will not prevent the defendant/respondent from raising the defence subsequently, if that is deemed appropriate. In that regard the defendant/respondent despite being in default in failing to plead the defence, is in a better position than the defendants in those cited cases***.***

[20] It is significant that the defendant/respondent is not seeking to allege that the Adjudications in question were referred to Arbitration. On the face of it therefore the Adjudications would stand. The defendant/respondent however says the Adjudications are now of no moment as time has run against the claimant/applicant and the court should not act in vain. The fact is however the limitation of actions defence was not pleaded. If it was, the claimant would have had a chance to say either that it did not apply

based on an operative date later than the date of the contract, or plead acknowledgment of debt. This court has no idea how such matters would be determined. It therefore cannot be conclusively stated that if the declarations are granted the court would be acting in vain. It would also require further time for the claimant/applicant to reply if time were given to the defendant/respondent to file an affidavit in response. At this point however, especially in the face of a consent order made in the Court of Appeal limiting the time by which an affidavit in response should have been filed, even if the court was inclined to give the time sought to file that affidavit, it is doubtful whether I would have jurisdiction so to do. Granting further time would also directly contravene the order of the Court of Appeal for a speedy trial.

[21] Would it in those circumstances be right to deny the claimant/applicant the declarations sought in a situation where the defendant/respondent is not maintaining that the matters were referred to arbitration and it is uncertain whether or not the defence as yet unpleaded would apply? I think not. If the declarations are granted and the claimant/applicant submits a claim to the relevant Ministry based on the Adjudications it can either be accepted, rejected or there may be negotiations. If it is ultimately rejected and the claimant/applicant seeks to bring a claim supported by the declarations, the defendant/respondent could then plead the limitation of actions defence and the claimant/applicant could seek to demonstrate why it does not apply. At this point all the claimant/applicant seeks are declarations that determine the legal status of the Adjudications made. In the circumstances I see no impediment to them being granted. Time will tell what value this declaratory relief supplies to the claimant/applicant.

ORDER

[22] I therefore in granting the application of the claimant/applicant make an order in terms of paragraphs 1, 2 (i), (ii), (iii) and (v) of the Notice of Application for Court Orders in this matter dated and filed July 10, 2014.